IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10/03/2006

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THE HON'BLE MR. JUSTICE P.K. MISRA

W.P.NO.17742 OF 2004
and
WP.NO.25244 OF 2005

R. Deenadayalan
S/o.P. Ramachandran .. Petitioner in both WPs

-Vs-

1. State of Tamilnadu
represented by Secretary
to Govt., Adi Dravidar &
Tribal Welfare Department,
Fort St. George, Chennai 9. ..Respondent No.1 in W.P.No.
17742 of 2004

2. The Commissioner and Director
of Adi Dravidar Welfare,
Chennai. .. Respondent No.2 in both WPs

3. The Accountant General (A&E)
Tamil Nadu, Chennai 18. .. Respondent No.3 in
WP.No.17742/05 & R-1
in WP.25244/05

W.P.No.17742/04 has been filed under Article 226 of the Constitution of India for the issuance of writ of mandamus directing the respondents 1 & 2 to refix the petitioner□s pay scale in the post of P.G. Assistant with effect from 21.6.1983 and to pay monetary benefits (arrears of salary) with effect from the actual date of promotion being 19.1.1990 taking into consideration 21.6.1983 as promotion date in the said post and to grant all other consequential service and monetary benefits including selection grade in the post of P.G. Assistant with effect from 21.6.1993 the date of completion of 10 years as P.G. Assistant.

W.P.No.25244 of 2005 has been filed to issue a writ of certiorarified mandamus calling for records relating to the order passed by the 2 nd respondent Na.Ka.No.A1/8532/2004 dated 2.5.2005 and quash the same and further direct the 2nd respondent to fix the pay scale of the petitioner in the post of P.G. Assistant w.e.f. 21.6.1983 in terms of the order passed by the Tribunal in O.A.No.4638 and 8125 of 2001 dated 3.7.2002.

For Petitioner : Mr.V. Chandrasekaran
in both WPs

For Respondents : Mr.S. Gomathi Nayagam
Special Govt. Pleader - - -

COMMON JUDGMENT

These two writ petitions filed by the very same petitioner were heard together and shall be governed by the present common order.

2. The petitioner was appointed as B.T. Assistant vide order dated 2 4.6.1980 in R.C.No.3620/1980, pursuant to which he joined service on 30.6.1980. The petitioner was promoted as P.G. Assistant (Economics) by order dated 19.1.1990 in R.C.No.22582/1990. However, the petitioner found that his junior one V.K. Velayudam had been promoted as P. G. Assistant in 1983 itself. Thereafter the petitioner made several representations seeking promotion from the date when his junior was promoted but, such representations having been rejected, he filed O.A. Nos.4638 of 2001 and 8155 of 2001 claiming promotion from retrospective date and also seniority. Both the Original Applications were allowed by the Tribunal by common order dated 3.7.2002. The relevant portion of the order is as follows : In the circumstances, the petitioner shall be given notional promotion from 21.6.1983 for the purpose of seniority only and that seniority shall be reckoned in the cadre of the post graduate Assistant from that date. The petitioner will be entitled to service benefits as if he has been promoted from 21.6.1983, but monetary benefits need not be given to him. In view of his success in O.A.No.4638 of 2001, the petitioner is entitled to succeed in the other Original Application. Hence, O.A.Nos.4638 and 8125 of 2001 are allowed. His seniority shall be reckoned from 21.6.1983. The same date shall be taken into account for the purpose of seniority in the cadre of Post Graduate Assistant and Promotion to the post of Headmaster of Higher Secondary School.

3. Pursuant to the aforesaid common order, the second respondent passed order in Na.Ka.No.A1.484/2002 dated 21.1.2003 indicating that seniority of the petitioner as P.G. Assistant would be fixed with effect from 21.6.1983 and further indicating that his further promotion as Headmaster would be given on the basis of such seniority. However, according to the petitioner, he was not given the monetary benefits nor he was given the benefit of selection grade in the post of P.G. Assistant from 21.6.1993, when he must be taken to have completed 10 years. The petitioner was promoted as Headmaster by order dated 24.1.2003, but selection grade service benefits as P.G. Assistant were not given. According to the petitioner, he was entitled to other service benefits by taking into account his seniority from 21.6.1983 and the pay should have been re-fixed with effect from 19.1.1990, when he was actually promoted, by taking into account the notional promotion for the period from 21.6.1983 to 19.1.1990. The petitioner has thereafter filed the present W.P.No.17742 of 2004 for a direction to refix the pay scale in the post of P.G. Assistant with effect from 21.6.19 83 ad to pay monetary benefits with effect from the actual date of promotion i.e., 19.1.1990. In the meantime, the petitioner has opted to go on voluntary retirement on

31.5.2004. The petitioner had also filed WPMP.No.20717 of 2004 for payment of pensionary benefits and on the assertion that the pensionary benefits would be given, the petitioner withdraw such miscellaneous petition. Subsequently, the petitioner received Order dated 24.1.2005 in No.A.G. (A&E)P 09/5/060-1439/V.R./2004, wherein it was indicated that certain amount had been paid in excess from 1.6.1988 till 31.5.2004, which were to be recovered. In such order it was also indicated that his net gratuity was Rs.1,93,300/-. Such order was challenged by the petitioner in W.P.No.6051 of 2005. The said writ petition was disposed of by the following order : By proceedings dated 24.01.2005, the first respondent has merely stated that excess payment towards Pay and Allowance is to be recovered, which payment is said to have been made between 01.06.1988 to 31.05 .2004. The said statement has been made while sanctioning the gratuity payable to the petitioner. Since no details have been mentioned nor was the petitioner given any opportunity before ordering such a recovery, it is imperative that petitioners representation dated 07.02 .2005 is considered by the first respondent and a detailed order passed as to nature of recovery to be made. With that view, the first respondent is directed to consider the petitioners representation dated 07.02.2005 in accordance with law and on merits after giving an opportunity of personal hearing to the petitioner. The first respondent shall carry out the above said exercise within a period of four weeks from the date of receipt of a copy of this order.

Thereafter, opportunity of personal hearing was given and a further order was passed on 23.5.2005 indicating that amount is recoverable as the petitioner drawn amount higher than his entitlement. This order has been challenged in W.P.No.25244 of 2005.

4. The main contentions raised by the petitioner in the two writ petitions are to the effect that the petitioner should have been given the benefit as contemplated in the order passed by the Tribunal and the arrear amount payable from 21.6.1983 till 19.1.1990, when the petitioner was actually promoted, has not been paid, but on the basis of notional calculation, the benefits should have been made after 1990. It has been further submitted that at any rate when as per the order of the Tribunal the petitioner was deemed to have been promoted as P.G. Assistant with effect from 21.6.1983, the so called wrong fixation of pay in the post of B.T. Assistant in 1988 onwards lost its significance and at any rate such amount having been paid not on the basis of any misrepresentation made by the petitioner, but by the calculation made by the department itself, there should not have been any direction for refund of such amount.

5. A counter affidavit has been filed on behalf of the State Government stating that earlier order fixing seniority and promoting the petitioner as Headmaster has been rightly passed. Thereafter, it was found that the petitioner had been paid higher amount by mistake from 1988 onwards and, therefore, while calculating the gratuity and pension amount payable, a direction was issued for recovery of the amount paid by mistake earlier.

6. The order passed by the Tribunal on the earlier occasion in O.A.Nos.4638 & 8125 of 2001 has already been extracted. From the aforesaid

order, it is apparent that the petitioner shall be notionally deemed to have been promoted as P.G. Assistant with effect from 21.6.1983 , when his junior had been promoted. However, the Tribunal had made it clear that no financial benefit would be payable. The order of the Tribunal read in the background of the case would mean that till disposal of the order passed by the Tribunal, i.e., 3.7.2002, the petitioner would not be entitled to any actual arrear monetary benefit. However, the service benefits were to be notionally calculated by considering that the petitioner was a P.G. Assistant with effect from 21.6.1983. Even though no financial benefit was available to the petitioner prior to the date of the order of the Tribunal, it is obvious that on the basis of such Tribunal□s order, the benefit upto the date of the order of the Tribunal, i.e. 3.7.2002, should be notionally calculated and on the basis of such notional calculation, the petitioner was entitled to further benefits, including financial benefits, only with effect from the date of the order of the Tribunal.

7. The next question is relating to recovery of the amount as indicated in the order impugned in W.P.No.25244 of 2005. In my considered opinion, such direction regarding recovery of amount, which had already been paid, should not be insisted upon for more than one reason. First of all, it is apparent that the excess amount, if any, had been paid by the Department not on the basis of any misrepresentation made by the petitioner. In such view of the matter, it would be improper on the part of the Department / Respondent No.3 to insist upon repayment of such amount.

8. In this connection, the decision of the Supreme Court reported in (1994) 2 SCC 521 (SHYAM BABU VERMA AND OTHERS v. UNION OF INDIA AND OTHERS), which is the decision rendered by three Hon□ble Judges, is relevant. In the said decision it was observed as follows : □11. Although we have held that the petitioners were entitled only to the pay scale of Rs.330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs.330-560 but as they have received the scale of Rs.330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them,. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same.□

9. The observation made by the Supreme Court in 1995 Supp(1) SCC 18 (SAHIB RAM v. STATE OF HARYANA AND OTHERS) being appropriate for the present case, is quoted hereunder : □5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. The

principal of equal pay for equal work would not apply to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs. (Emphasis added)

10. Similar views have been expressed subsequently by the Supreme Court in 2002(6) Supreme 418 (P.H. REDDY ANDOTHERS v. NTRD AND OTHERS), wherein it was observed : 2. ... In our view, therefore, the judgment of this Court in the Director General, ESI, represents the correct view, and consequently the order of re-fixation done by the appropriate authority, in the case in hand, does not require any interference, but the employeesappellants, who had been in receipt of a higher amount on account of erroneous fixation by the authority should not be asked to repay the excess pay drawn, and therefore, that part of the order of the authority is set aside. The direction of the appropriate authority requiring reimbursement of the excess amount drawn is annulled. (Emphasis added)

11. It is of course true that the learned counsel appearing for the State has relied upon a decision of the Supreme Court in (2000) 9 SCC 187 (UNION OF INDIA AND OTHERS v. SUJATHA VEDACHALAM (SMT) AND ANOTHER), wherein the Supreme Court had permitted recovery of any excess amount paid by mistake in easy instalments. The observation of the Supreme Court is as follows : 3. For the reasons stated in Comptroller & Auditor General of India v. Farid Sattar decided today and decision of this Court in Special Leave Petition No.9324 of 1996 titled Chandan Saha v. Union of India decided on 25-4-1996 the impugned orders and judgments under appeal are set aside. Both these appeals are allowed. There Shall be no order as to costs. However, so far as recovery of excess pay paid to the respondents is concerned, the appellants may recover the said amount in easy instalments which may be spread over for fifteen years or till the date of retirement, whichever is earlier.

12. In the aforesaid decision rendered by two Hon ble Judges of the Supreme Court, reference has been made to judgment of the Supreme Court in Comptroller & Auditor General of India v. Farid Sattar reported in (2000)4 SCC 13. A perusal of latter decision clearly indicates that the person who sought transfer on his own volition was not eligible to claim the benefit available under normal transfer. In this context, it is fruitful to extract the following observation :-

5. ... Here, what we find is that the respondent on his own volition sought transfer on certain terms and conditions accepted by him. The terms and conditions of unilateral transfer are very clear and there is no ambiguity in it. The terms and conditions provided that the respondent on transfer would be appointed to a post which is lower to the post which he was occupying prior to his transfer and he was also required to tender technical resignation from the post which he was holding with a view to join the lower post as a direct recruit and was to rank junior to the juniormost employee in the cadre of Accountant. He was further required to forego any benefit of passing any departmental examination while working in the higher post. In such a situation, the pay of the respondent had to be fixed with reference to

the lower pay scale and not with reference to the pay drawn by him in the higher post since he was to be considered as a direct recruit in the lower post. 6. Under the terms and conditions of the transfer, the pay which the respondent was drawing on the higher post was not required to be projected when he joined the lower post of Accountant.

13. Therefore, in the decision of the Supreme Court, it has been observed that the person who had received such impermissible amount was required to refund such amount. The factual scenario in the decision of the Supreme Court relied upon by the State Government cannot be made applicable to the facts of this case, more particularly when there are several other decisions of the Supreme Court, one of a larger Bench, which are applicable to the facts of the present case.

14. Apart from the above, it is apparent that the petitioner should have been promoted as P.G. Assistant with effect from 21.6.1983 but, only because he had claimed such promotion belatedly, the Tribunal had given him only a notional benefit. It would be indeed paradoxical to permit the Government to recover certain amount to which in normal course the petitioner would have been entitled if he would have been given the P.G. Assistant scale from the due date.

15. For the aforesaid reasons, the impugned order is also liable to be quashed to the extent that there is a direction for recovery. The direction regarding payment of gratuity is also required to be reconsidered taking into fact that the petitioner was entitled to notional benefit from 21.6.1983 and, on that basis, such benefits are to be recalculated from the date of the order of the Tribunal.

16. Subject to the aforesaid observations and directions, both the writ petitions are allowed to the extent indicated above. The directions should be given effect to within three months from the date of receipt of the order. No costs.

Index : Yes
Internet: Yes
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To

1. State of Tamilnadu
represented by Secretary to Govt.,
Adi Dravidar & Tribal Welfare Department,
Fort St. George, Chennai 9.

2. The Commissioner and
Director of Adi Dravidar Welfare,
Chennai.

3. The Accountant General (A&E)
Tamil Nadu, Chennai 18.